Accordingly, the Commission should decline the invitation it will no doubt receive to rewrite Section 275(a)(1) so as to include the references Congress purposefully omitted.[19] That invitation can be accepted, if at all, only by Congress.

C. Nondiscriminatory Terms and Conditions - NPRM (para. 74)

Section 275(b)(1) requires that an incumbent LEC "provide nonaffiliated entities, upon reasonable request, with the network services it provides to its own alarm monitoring operations, on nondiscriminatory terms and conditions." No specific regulations are necessary to implement this section. The language of the statute is sufficiently clear and, as noted by the Commission, Sections 201 and 202 of the Act already place significant nondiscrimination obligations on common carriers. NPRM, para. 74. Section 201(b) requires that common carrier classifications and practices be reasonable, and Section 202(a) prohibits unreasonable discrimination by any common carrier in connection with like communications services, and also prohibits giving any undue or unreasonable preference or advantage to any entity. No additional regulation is necessary or would be any more effective than these sections of the Act. For these and the additional reasons stated at Section I, supra, no implementing regulations should be adopted in this area.

In any case, Section 275(b)(1) of the Act places nondiscrimination obligations on all incumbent local exchange carriers. Thus, if the Commission concludes that any rules should be adopted, then those rules must apply equally to all incumbent LECs.

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[19] Even apart from the omission of any reference to "sale" in Section 275(a)(1), there is no such reference either in Section 275(e), which defines "alarm monitoring service," or elsewhere in the statute.

IV. TELEMESSAGING - SECTION 260 - NPRM (para. 77)

Section 260 sets forth the specific nondiscrimination requirements applicable to LECs engaged in the provision of telemessaging service. In particular, Section 260(a)(2) prohibits a LEC from discriminating in favor of its own telemessaging service operations in the course of its provision of telecommunications services. The Commission seeks comment on whether and what types of specific regulations are necessary to implement this section. NPRM, para. 77.

For several reasons, specific regulations to implement Section 260(a)(2) are unnecessary and should not be adopted. First, the language of the statute is sufficiently clear such that additional regulations would serve no useful purpose. Second, the obligations imposed by Section 260(a)(2) are largely duplicative of those which currently exist under Sections 201 and 202 of the Act. Promulgating additional regulations to interpret the nondiscrimination requirements applicable to telemessaging services would not add anything of substance to present law.

Alternatively, to the extent that the Commission adopts any regulations to implement the statutory safeguards of Section 260(a)(2), such regulations must be applied to all LECs in order to fulfill the requirements of the telemessaging statute. Nothing in the statute indicates that Congress intended for terms to be applied to any other than all LECs. If the Commission is to read into that statute additional pre-existing obligations (although Congress did not so intend), then the Commission should at least make certain that those additional obligations are likewise applied to all LECs.

V. ENFORCEMENT ISSUES

A. Legal and Evidentiary Standards Governing a Prima Facie Claim - NPRM (paras. 79, 82)

The Commission asks for comment on the legal and evidentiary standards necessary to establish that a BOC has violated Section 260 (telemessaging services), Section 274 (electronic publishing services) and Section 275 (alarm monitoring services). NPRM, paras. 79, 82. In particular, the Commission inquires regarding what specific acts or omissions would be sufficient to state a prima facie claim for relief under these sections. Id. Finally, the Commission asks whether shifting the ultimate burden of proof from the complainant to the respondent at some point in the case would advance the pro-competitive goals of the Act. These questions are answered by the Act itself and other law. The Commission need not and should not disturb well-established legal and evidentiary standards governing a claim for relief.

The Commission should not attempt to specify the acts or omissions necessary to state a prima facie claim for relief under Sections 260, 274 or 275. Each of these statutes sufficiently sets forth with specificity the elements of proof necessary to be satisfied.

Thus, for example, a prima facie case under Section 260(a) requires proof either that the local exchange carrier is subsidizing its telemessaging service from its telephone exchange service or exchange access, or that the local exchange carrier is preferring or discriminating in favor of its telemessaging service operations in the course of its provision of telecommunications services. Under Section 274, the elements of proof are well stated in the various operational independence requirements provided within subsections (b)(1) - (7) and in the joint marketing provisions provided at Subsection (c). Finally, a prima facie case under Section 275(b) requires proof either of a failure to provide upon reasonable request the network services an incumbent LEC provides to its own alarm

monitoring operations on nondiscriminatory terms and conditions, or incumbent LEC subsidization of its alarm monitoring services from telephone exchange service operations. Congress has not provided the Commission with authority to lessen or otherwise alter a complainant's duty to establish these elements of proof, nor has it altered the preponderance of the evidence standard applicable to civil cases generally. The Commission should likewise refrain from doing so.

B. The Burden of Proof - NPRM (paras. 79, 82)

The Commission asks whether, for complaints arising under Sections 260, 274 and 275, shifting the ultimate burden of proof from the complainant to the defendant would advance the pro-competitive goals of the 1996 Act. NPRM, paras. 79, 82. The Commission should not alter the well-established assignment of burden of proof. Doing so would not be justified by either legal or public policy reasons.

As the Commission observes, it is well-established that the complainant generally has the burden of establishing that a common carrier has violated the Communications Act or a Commission rule or order. NPRM, para. 79. Similarly, this burden of proof generally does not, at any time in the proceeding, shift to the carrier. Id. Nothing in the language of Sections 260, 274 or 275 signals any intention by Congress to depart from these long held-legal principles in complaints (or in the case of electronic publishing, civil actions) alleging violations of these sections.

Moreover, in the electronic publishing context, a contrary conclusion would lead to unnecessary and counterproductive forum-shopping, to the extent that those entitled to bring a private right of action under Section 274(e) would be prompted by the reduced burden of proof to file a complaint with the Commission rather than bring suit. Finally, altering the presumption regarding the burden of proof would conflict with the standard governing complaints brought under

Section 208, where "the burden of establishing a violation remains with the complainant." NPRM, para. 34.

The Commission need not speculate as to whether shifting the ultimate burden of proof would advance the pro-competitive goals of the 1996 Act. Congress has already determined those procedural and substantive matters which it concluded would advance its competitive objectives, and the Commission should not take upon itself the authority to engraft additional measures. To the contrary, given the private right of action allowed electronic publishing litigants, and the expedited consideration of complaints provided for with respect to telemessaging and alarm monitoring services, Congress could well have then and there determined to alter the otherwise governing legal principles associated with the assignment of the burden of proof. It did not choose to do so, and therefore, neither should the Commission.[20]

C. The Requirement of Material Financial Harm - NPRM (para. 83)

Those complainants availing themselves of the expedited complaint procedures established by Sections 260(b) and 275(c) are required to establish "material financial harm." The Commission inquires whether there should be a particular legal evidentiary showing that the complaint must make in order to demonstrate material financial harm, or whether the Commission should decide the materiality of the harm on a individual case basis.

Whether the harm alleged to be suffered by a complainant is material should be decided on an individual case basis. The law generally requires that proof of damages (i.e., harm) must be direct and concrete, not speculative, and that the amount of damages must be proven with reasonable

[20] Moreover, shifting the burden of proof would be inconsistent with the complainant's own duty to show "material financial harm" to qualify for expedited consideration of its complaint. Sections 260(b), 275(c). To the contrary, such a shifting could well cause a proliferation of tenuous (or even meritless) complaints by those who would intend to engage in fishing expeditions.

certainty.[21] "Material" should be construed as "substantial," not merely trivial.[22] Thus, all complainants under Sections 260 and 275 desiring expedited action should be required to demonstrate damages that are direct, quantified (or at least capable of quantification) and substantial. The sufficiency of the harm (i.e. whether it is material) should be determined on a case by case basis and should not in any case be presumed.

Thus, if the complainant's pleadings allege a violation of the nondiscrimination requirements of Sections 260 or 275 but do not demonstrate material financial harm, the complainant should not be entitled to expedited review. Those who can demonstrate no more than trivial damages are precluded from expedited complaint procedures by the words of the statute itself.

D. Cease and Desist Orders - NPRM (paras. 80, 84)

The Commission asks parties to comment specifically on what showing, if any, is required for the issuance of cease and desist orders under Section 274. NPRM, para. 80. The Commission also asks whether the evidentiary showing would be different for a complainant seeking damages under subsection (e)(1) as opposed to one seeking a cease and desist order under Subsection (e)(2). Id. The Commission asks similar questions with respect to what constitutes an "appropriate showing" for the Commission to issue the LEC an order "to cease engaging" in an alleged violation of Section 260 or Section 275. NPRM, para. 84.

With regard to electronic publishing under Section 274, the standard for successfully obtaining a cease and desist order should be no less demanding than that which would entitle a complainant

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[21] Blanche Road Corp. v. Bensalem, 57 F.3d 253 (3d Cir. 1995); Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993); Cole v. Control Data Corp., 947 F.2d 313 (8th Cir. 1991).

[22] See, Webster's Third New International Dictionary (1981), at 1392 ("being of real importance or great consequence"); cf., Black's Law Dictionary (5th ed., 1979), at 880 (a representation "so substantial and important as to influence party to whom made" is material).

to secure damages -- establishing a violation of the elements of proof required by the type of claim brought under Section 274. Although subsection (e)(2) entitles a person to "make application" for a cease and desist order, it does not alter a complainant's duty to prove that it is entitled to relief, whether legal or equitable in nature.

Cease and desist orders issued on the basis of the "appropriate showing" language of Sections 260(b) and 275(c), however, should require additional and more stringent proof. In contrast to such relief in the electronic publishing context, cease and desist orders in the telemessaging and alarm monitoring contexts may issue based upon the showing contained in the complaint. Section 260(b); Section 275(c). Any form of injunctive relief granted on the basis of allegations in a complaint, prior to a full adjudication on the merits or even an opportunity to be heard, should not be allowed absent a detailed showing of irreparable harm, a substantial likelihood of success on the merits, and that the complainant has made every effort to notify the opposition of the filing of the complaint and of the request for a cease and desist order or other form of equitable relief.

VI. CONCLUSION

A host of benefits would accrue were the Commission to heed the call of restraint in adopting rules interpreting Sections 260, 274 and 275 of the Act: showing respect for Congress' authority and direction to deregulate the telecommunications markets; giving deference to its desire that reduced regulation be counterbalanced by elevating the role of private parties in resolving questions about the Act's obligations; adhering to the competitive balance struck by the Act's specific and detailed provisions; freeing service providers from the costly burdens associated with unnecessary regulatory

compliance; and, enabling service providers to focus maximum effort on bringing new and improved services to consumers who expect, if not demand, a "one-stop shopping" environment.

Ignoring the call of restraint would not bode well for the health of the communications industry or the stature of this Commission. Moreover, it would only serve to frustrate and confuse consumers who yearn for greater simplicity and less confusion in their dealings with communications providers.

For these reasons, SBC urges the Commission to heed, not ignore, Congress' call of restraint.

Respectfully Submitted,

SBC COMMUNICATIONS INC.

By _____

James D. Ellis
Robert M. Lynch
David F. Brown
175 E. Houston, Room 1254
San Antonio, Texas 78205
(210) 351-3478

ATTORNEYS FOR SBC COMMUNICATIONS INC.

Durward D. Dupre
Michael J. Zpevak
Robert J. Gryzmala
One Bell Center, Room 3520
St. Louis, Missouri 63101
(314) 235-2507

ATTORNEYS FOR SOUTHWESTERN BELL TELEPHONE COMPANY

September 4, 1996

Attachment A

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Southwestern Bell Telephone Company's Comparably Efficient Interconnection Plan for the Provision of Security Service	)	CC Docket Nos. 85-229, 90-623, and 95-20

REPLY COMMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY

ROBERT M. LYNCH
DURWARD D. DUPRE
MICHAEL J. ZPEVAK
DARRYL W. HOWARD

One Bell Center
Room 3520
St. Louis, Missouri 63101
(314) 235-2513

ATTORNEYS FOR
SOUTHWESTERN BELL TELEPHONE COMPANY

June 7, 1996

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SUMMARY*

The comments of Ameritech and AICC seek to have the Bureau reject SWBT's Security Service CEI Plan not on its merits, but on the basis of an overbroad interpretation of the prohibition contained in Section 275(a)(1) of the Act. As in the Bell Atlantic CEI Order, the Bureau should reject any opposition based upon Section 275 as being outside of the scope of this proceeding, and limit its consideration to the Commission's CEI plan requirements. SWBT has complied with those requirements and adequately addresses the single concern actually raised by AICC about the CEI Plan itself. The Bureau should approve SWBT's Security Service CEI Plan.

SWBT's planned activities do not violate the Section 275 prohibition, nor constitute the provision of "alarm monitoring service," a term defined with particularity in Section 275(e). SWBT's Security Service permissible activities include:

- Alarm CPE sales, which will include the sale, installation, maintenance, and repair of the customer premises equipment ("CPE"). A separate CPE contract, with distinct terms, conditions, and charges, will be executed between SWBT and the customer.

- Billing and collection activities, where SWBT performs the same type of billing and collection activities that it currently performs for interexchange carriers.

- A non-exclusive sales agency relationship, with SWBT selling and otherwise marketing the services of an unaffiliated entity providing the alarm monitoring service. The customer will know who the actual provider is, and will be required to enter into a contract for alarm monitoring service with that provider, which contract will control the terms, conditions, and price. The unaffiliated entity will also perform customer services associated with its provision of alarm monitoring service.

The relationships between SWBT, the alarm monitoring service provider, and the customer can be summarized as follows:

- No common control or other interest between SWBT and the alarm monitoring service provider.

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* The abbreviations used in this Summary are as defined in the main text.

– In addition to contractual privity directly with the customer, the alarm monitoring service provider is fully identified and disclosed in sales contacts, premises inspections, bills, and customer collateral material.

– The alarm monitoring service is provided only by the alarm monitoring service provider, including customer service for the alarm monitoring.

– SWBT is paid by the alarm monitoring service provider for billing and collection, and commissions for its sales agency activities, but does not share in the revenues of the alarm monitoring service provider.

– The relationship between SWBT and the alarm monitoring service provider is not exclusive for either.

SWBT performs none of the functions that constitute "alarm monitoring service," which are performed solely by independent provider of the alarm monitoring service. SWBT's limited role and activities do not result in it being "engaged in the provision of alarm monitoring service."

No specific objection is raised to SWBT's CPE activities, with AICC conceding that SWBT is free to perform those activities. Billing and collection does not constitute the provision of "alarm monitoring service," and being paid for those activities does not violate Section 275. All customer bills will reflect the different roles of SWBT and the provider, even when the separate charges from SWBT and the alarm monitoring service provider are billed in a lump sum. In acting as a sales agent for the alarm monitoring service provider, SWBT is not "engaged in the provision of alarm monitoring service." Prior Commission decisions, most notably the Sales Agency Order, have never considered sales agents to be providing the underlying service. The Bureau should not transform this proceeding into a rulemaking proceeding, especially one that broadens the Section 275 prohibition such that all relationships between alarm monitoring service providers and BOCs are precluded.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Southwestern Bell Telephone	)	
Company's Comparably Efficient	)	CC Docket Nos. 85-229, 90-623,
Interconnection Plan for the	)	and 95-20
Provision of Security Service	)	

REPLY OF
SOUTHWESTERN BELL TELEPHONE COMPANY

Southwestern Bell Telephone Company ("SWBT"), by its attorneys, submits this Reply to the comments filed in opposition to its CEI plan for Security Service ("CEI Plan" or "Plan") by the Alarm Industry Communications Committee ("AICC") and Ameritech Corporation ("Ameritech"). Notwithstanding the fact that this proceeding is limited to SWBT's compliance with CEI plan requirements, only the comments of AICC even nominally address SWBT's Plan and then in a footnote with a single objection. Inasmuch as that sole objection to the CEI Plan is invalid, the Bureau should approve the SWBT's CEI Plan.

The vast bulk of Ameritech's and AICC's comments are directed at alleging that SWBT's proposed Security Service violates Section 275 of the Telecommunications Act of 1996 ("Act"). Those comments are outside the scope of this proceeding and should be ignored.[1] However, as shall be seen, SWBT's Security Service has been carefully constructed to ensure full compliance with Section 275.

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[1] See *Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Internet Access Services*, CCBPol 96-09, Order, para. 47 (released June 6, 1996) ("Bell Atlantic CEI Order").

I. ALL OBJECTIONS BASED UPON SECTION 275 ARE OUTSIDE OF THE SCOPE OF THIS PROCEEDING

Yesterday, in approving a CEI plan filed by the Bell Atlantic Telephone Companies ("Bell Atlantic"), the Bureau rejected challenges that were grounded in the Act. In opposing an Internet CEI plan, MFS Communications Company ("MFS") had argued, inter alia, that the proposed Internet service violated Sections 251 and 252 of the Act. The Bureau concluded that

> MFS's arguments regarding Sections 251 and 252 of the Communications Act are beyond the scope of this proceeding. This proceeding is limited to determining whether Bell Atlantic's CEI plan complies with the Commission's Computer III requirements.

Bell Atlantic CEI Order, para. 47. After disposing of the other arguments raised against Bell Atlantic's CEI plan, the Bureau approved it.

The Bureau is confronted with the identical situation here. All of the arguments made by Ameritech and all but one of AICC's are based upon Section 275. The Bureau should follow the Bell Atlantic CEI Order by also concluding that those oppositions are outside the scope of this proceeding, and limiting this approval process to the Commission's CEI requirements. Inasmuch as SWBT has complied with those requirements and has fully addressed the single CEI issue raised by AICC,[2] the Bureau should approve SWBT's Plan.

II. SWBT'S ACTIVITIES ARE NOT PROHIBITED BY SECTION 275 OF THE ACT

Notwithstanding that applicable prior Bureau ruling, SWBT will provide a further explanation of its planned activities and relationship with the alarm monitoring service provider in

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[2] See page 14 *infra*.

order to assure the Bureau that SWBT's activities comply with Section 275.[3] SWBT's Security Service consists of the following permissible activities:

> – Alarm CPE sales, which will include the sale, installation, maintenance, and repair of the customer premises equipment ("CPE"). A separate CPE contract, with distinct terms, conditions, and charges, will be executed between SWBT and the customer.
>
> – Billing and collection activities, where SWBT performs the same type of billing and collection activities that it currently performs for interexchange carriers.[4]
>
> – A non-exclusive sales agency relationship, with SWBT selling and otherwise marketing the services of an unaffiliated entity providing the alarm monitoring service. The customer will know who the actual provider is, and will be required to enter into a contract for alarm monitoring service with that provider, which contract will control the terms, conditions, and price of the alarm monitoring. The unaffiliated entity will also perform customer services associated with its provision of alarm monitoring service.

A BOC may perform each of these activities, whether separately or together, without violating Section 275.[5]

Section 275(a) instead only prohibits SWBT from "engag[ing] in the provision of alarm monitoring service." As set forth in Section 275(e), "alarm monitoring service" is defined in

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[3] At the same time, this proceeding should not be used to engage in de facto rulemaking. See page 12 *infra*.

[4] Of course, SWBT will not deny or disconnect local service for a failure to pay its own CPE charges or the alarm monitoring service provider's charges.

[5] The exception to the Section 275 prohibition against a BOC being engaged in the provision of "alarm monitoring service" was created for the exclusive benefit of Ameritech, notwithstanding the fact that Ameritech is an affiliate of a BOC indistinguishable from SWBT or any other BOC with respect to any competitive concerns relating to the provision of alarm service. See Section 275(a)(2) (Ameritech is the only BOC to which that exception factually applies). Indeed, as originally passed by both houses, the prohibition would not have exempted the acquisition of an alarm company by Ameritech in September 1995. See House Bill No. 1555, proposed Section 273(a)(2), and Senate Bill No. 652, proposed Section 258(f), which only exempted from the general prohibition activities lawfully engaged in as of January 1, 1995, and June 1, 1995, respectively.

pertinent part as

> a service that uses a device located at a residence, place of business, or other fixed premises -- (1) to receive signals from other devices located at or about such premises regarding a possible threat at such premises to life, safety, or property, from burglary, fire, vandalism, bodily injury, or other emergency, and (2) to transmit a signal regarding such threat by means of transmission facilities of a local exchange carrier or one of its affiliates to a remote monitoring center to alert a person at such center of the need to inform the customer or another person or police, fire, rescue, security, or public safety personnel of such threat . . . (emphasis added)

Other than providing transmission capabilities under tariff as a local exchange carrier, SWBT performs none of the functions that constitute "alarm monitoring service." Each of those functions are performed solely by the independent alarm monitoring service provider. The relationships between SWBT, the alarm monitoring service provider, and the customer can be summarized as follows:

- No common control or other interest between SWBT and the alarm monitoring service provider.

- Two separate contracts: one between SWBT and the customer for CPE and CPE-only associated services, the other between the alarm monitoring service provider and the customer for the alarm monitoring service.

- In addition to contractual privity directly with the customer, the alarm monitoring service provider is fully identified and disclosed in sales contacts, premises inspections, bills, and customer collateral material.

- The alarm monitoring service is provided only by the alarm monitoring service provider, including customer service for the alarm monitoring.

- SWBT is paid for billing and collection, and commissions for its sales agency activities, but does not share in the revenues of the alarm monitoring service provider.

- The relationship between SWBT and the alarm monitoring service provider is not exclusive for either party. SWBT remains free to act as a sales agent for other alarm monitoring service companies, and the alarm monitoring service provider may use other sales agents or other distribution channels where SWBT sells its alarm monitoring service.

These limited roles, activities, and attributes simply do not place SWBT in the position of being "engaged in the provision of alarm monitoring service."

A. SWBT IS PERMITTED TO SELL CUSTOMER PREMISES EQUIPMENT USED FOR ALARM MONITORING SERVICE

SWBT intends to enter into contracts for the sale, installation, maintenance, and repair of CPE that can be used to provide alarm monitoring service. The contracts will be solely between SWBT and customers, with separately stated terms, conditions, and prices for the CPE and associated services. The Bureau should note that, with the exception of the sale of the CPE, those associated activities are "services," belying any insinuation that "SWBT Security Service" somehow indicates that SWBT will be engaged in the provision of alarm monitoring service.

As acknowledged by both commentors,[6] these activities do not violate Section 275. Any contrary construction of Section 275 would be patently unreasonable. First and foremost, the definition of "alarm monitoring service" declares it to be a "service"; CPE is a "good." Also, the CPE-associated services that SWBT will perform do not comprise any of the functions that constitute "alarm monitoring service." Finally, as the Bureau may be aware, many purchasers of this type of CPE do not even subscribe to remote monitoring services, but rather use the CPE to provide a premises-only alarm. Inasmuch as remote monitoring is required before the Section 275(a)(1) prohibition applies, attempting to include CPE within that prohibition would create a practical nightmare with an anticompetitive effect (e.g., BOCs could sell CPE if it was not to be connected to a remote monitoring center, but would be forbidden to sell if such a connection was

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[6] See AICC, at p. 3 n.6 ("Section 275 permits the BOCs only to provide sales, installation and maintenance of alarm monitoring CPE"); Ameritech, at p. 2 (notes SWBT's CPE activities,

to be made). Such a distinction would be akin to prohibiting the sale of CPE to be used for interLATA service, but not intraLATA service. Accordingly, there can be no doubt that SWBT's planned CPE activities are not prohibited by Section 275. AICC's use of this permissible activity in its chart to imply a violation of Section 275 is thus disingenuous at best.[7]

B. BILLING AND COLLECTION ACTIVITIES ARE NOT PROHIBITED BY SECTION 275

SWBT will also perform billing and collection services for the provider of the alarm monitoring service. Again, such activities do not place BOCs in the position of being "engaged in the provision" of the service being charged. Beyond the fact that billing and collection activities simply cannot be read into the rather detailed definition of "alarm monitoring service," the Commission has never considered billing and collection activities to be equivalent to providing the service being billed and collected. In the detariffing proceeding, the Commission concluded that billing and collection is a financial and administrative service that is offered by other companies.[8] Given that the Commission doubted that billing and collection performed for another carrier was "common carriage" or even a "communications service,"[9] it had already implicitly rejected any notion that by billing and collecting for a service, the entity providing those financial and administrative functions was engaged in the provision of the underlying service. Moreover, if billing and collection was interpreted to involve a BOC in actually providing the service being

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[7] AICC, p. 10 ("CPE Installed and Maintained by:").

[8] *Detariffing of Billing and Collection Services*, CC Docket No. 85-88, Report and Order, 102 FCC 2d 1150, 1168, 1169 (1986).

[9] Id., p. 1169.

billed, BOCs would have previously been forbidden by the Modification of Final Judgment[10] ("MFJ") from performing billing and collection activities for interLATA services. Of course that was not the case, and BOCs continue to perform such activities despite the Act's similar interLATA prohibition. Accordingly, SWBT's plan to perform the range of billing and collection activities for the alarm monitoring service provider is permissible under Section 275.

As one should expect, SWBT will be compensated for its billing and collection activities. The fact that SWBT's compensation is generated from the payment of alarm monitoring service charges does not, however, result in SWBT either "sharing" in the monitoring revenues[11] or being engaged in the provision of alarm monitoring service. Being paid does not transform permissible work into prohibited work.

SWBT's current plan is that, where permitted, a single amount will be billed that will reflect the total of both SWBT's CPE charges and the alarm monitoring service provider's charges. The bill will note, however, that the alarm monitoring service is being provided by an unaffiliated provider, who will be identified by name. Since the customer will have two separate contracts (one with SWBT for the CPE, and one with the alarm monitoring service provider for its service), there is no "bundled" package. The two separate charges are simply combined for billing purposes. There is nothing unlawful or inappropriate about such a billing practice. The Bureau should ignore AICC's insinuations of the contrary.[12]

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[10] United States v. Western Electric Co., 552 F. Supp. 131 (D.D.C. 1982).

[11] As stated in the Plan at page 2 and as elaborated upon at page 11 *infra*, the alarm monitoring provider is not affiliated with SWBT in any way.

[12] See AICC, p. 10, where AICC included these permissible activities in its chart as "Invoices Rendered in the Name of:" and "Customer Payments Made Payable to:".

C. SALES AGENCY RELATIONSHIPS ARE NOT RESALE ARRANGEMENTS, AND AGENTS DO NOT PROVIDE THE SERVICE SOLD

SWBT will act as a sales agent for the unaffiliated entity providing alarm monitoring service. Beyond the fact that SWBT will not be performing the functions set forth in the definition of "alarm monitoring service," no one can reasonably assert that a sales agent engages in the provision of the service sold for and provided exclusively by another. Sales agency relationships are quite common in the telecommunications industry, and have not been considered by the Commission or State regulators to constitute the provision of the underlying service.

For example, the Commission instituted a sales agency program when structural separation was required of BOCs for the provision of CPE.[13] Under that structure and approved plans, BOC affiliates were permitted to sell and otherwise market BOC-provided telecommunications services. By performing that role (and being compensated for the sales made on a commission basis), neither the structurally-separate BOC affiliate nor any other sales agent actually provided the underlying telecommunications service being sold. SWBT is not aware of a single instance where a sales agent was required to be certified as a carrier by any State, was required to file tariffs with any State or the Commission, or otherwise was treated as the carrier as a result of its role as a sales agent.

Similarly, cellular carriers use sales agents to sell and otherwise market their telecommunications services, and those agents are not seen as providing cellular service by either the Commission or customers. As SWBT proposes with regard to alarm monitoring service, cellular sales agents sell the cellular provider's service for that provider's account in exchange for

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[13] See Sales Agency Order, 98 FCC 2d 943 (1984).

payment on a commission basis.[14] Indeed, in describing the role and relationship of the cellular sales agent to its principal, courts invariably refer to the principal as the 'provider' of cellular service.[15] These current, daily examples of situations where the Commission, the law, and the marketplace distinguish between sales agents and the entity actually providing the underlying service itself contradict AICC's professed belief that policing such a distinction is "impossible in the real world."[16]

Like those other sales agents, SWBT will not be a reseller/provider of alarm monitoring service. The terms and conditions of the alarm monitoring service will be set forth in the contract between the customer and the provider and remain within its control (e.g., charges, term, alarm monitoring service description and standards, limitations of liability). AICC's continuous use of the term "resell" is thus wholly unjustified. SWBT will not set the price for the alarm monitoring service or rebrand the service as SWBT's, clearly falling outside the previous Commission

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[14] Cellular sales agents also sell and install CPE under separate contract with the customer, in the same manner as SWBT proposes.

[15] See, e.g., Metro Communications Co. v. Ameritech Mobile Communications, Inc., 984 F.2d 739, 741 (6th Cir. 1993) ("Each [plaintiff] entered into an agency contract with [Ameritech], a provider of cellular telephone services and equipment."); Cellular Plus, Inc. v. Superior Court, 14 Cal. App. 4th 1224, 1229 ("This case involves a lawsuit . . . against the two licensed providers of cellular telephone service".); GTE Mobilnet of S. Tex. Ltd. Partnership v. Telecell Cellular, Inc., 1995 Tex. App. LEXIS 1985 (Tex. App. 1985) ("The appellees are authorized agents of GTE Mobilnet. . . . Mobilnet provides cellular telephone service to its customers."); American Cellular Network Corp. v. Car-Talk, Inc., 1990 Del. Ch. LEXIS 76 (Del. Chancery 1990) ("The only other company [beside the cellular carrier plaintiff] that the FCC has licensed to provide cellular telephone service within the Wilmington CGSA is Bell Atlantic. . . . Thus, the highly competitive Wilmington area market for providing cellular telephone service has only two key 'players'".).

[16] AICC, p. 14.

decisions cited by AICC.[17] AICC and Ameritech both have the contractor/subcontractor analogy backwards -- at most, SWBT's limited role as a sales agent might make it a subcontractor of the alarm monitoring provider, but could never make the provider the subcontractor.

Consistent with the nature of the sales agency relationship, purchasers of alarm monitoring service will be made aware of the actual, unaffiliated provider of the alarm monitoring service at all times. In fact, from the first telephone contact with a potential customer, the unaffiliated alarm monitoring service provider will be clearly identified as the provider of the monitoring service. Interested customers will enter into a separate service contract with the alarm monitoring service provider, which will include service charges and general terms and conditions (term, alarm monitoring service description, limitations of liability, notice provisions). SWBT will again inform the customer of the separate roles to be played by SWBT and the alarm monitoring service provider during the premises assessment by a SWBT sales representative. After installation, the customer will be given instructions on how to call the alarm monitoring service provider using an "800" number selected by the provider in case of emergency, and other provider-designated numbers for service-related inquiries (such as update of emergency contact information, resolution of alarms, communication of personal health information). When a customer calls SWBT to inquire about the alarm monitoring service (as opposed to equipment or billing complaints or questions), the customer will be referred to the alarm monitoring service provider. On bills rendered to the customer, the alarm monitoring service provider will be clearly and separately identified. All associated correspondence and materials (e.g., yard signs, window stickers, other customer collateral) will further identify the alarm monitoring service provider.

[17] AICC, p. 8 n.10.

Claims that SWBT will be the "sole customer contact and would actually undertake all aspects of the offering of alarm service to consumers"[18] are thus demonstrably false, and AICC's assertion that "Customer Inquiries/Problems Directed to" SWBT is simply wrong.[19]

In sum, there is no attempt to conceal the identity of the provider of the alarm monitoring service, or to confuse the customer into believing that SWBT is providing alarm monitoring service. There will be no branding of the alarm monitoring service as SWBT's as AICC alleges.[20] To the contrary, the existence and identity of the unaffiliated alarm monitoring service provider will be open and well-known, with the customer contracting separately with that service provider and being reminded on at least a monthly basis with each bill.

D. NEITHER SWBT NOR ANY OF ITS AFFILIATES HAVE ANY INTEREST IN THE ENTITY ACTUALLY PROVIDING THE ALARM MONITORING SERVICE

In addition to its statements in the Plan,[21] SWBT wishes to allay any concerns that may be raised by AICC and its unjustified use of quotation marks around "unaffiliated"[22] -- the entity that will provide the alarm monitoring service is completely independent of SWBT. Neither SBC Communications Inc. nor any of its affiliates has any equity or equitable interest in the alarm monitoring service provider, and has not acquired any option, right of first refusal, or other

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[18] See, e.g., AICC, p. 6.

[19] AICC, p. 10. As explained above, SWBT will bill and collect for the provider, which will include handling customer billing inquiries.

[20] AICC, p. 7.

[21] See e.g., Plan, pp. 2, 4.

[22] AICC, p. 10.

contractual right to gain any such interest. Further, there is no creditor/debtor relationship with the alarm monitoring service provider, and thus no security interest in it, its customer contracts, or any part of its operations. Simply stated, there is no basis for AICC's professed concern about Southwestern Bell having a "superior right" to the provider.

III. THE BUREAU SHOULD NOT ALLOW THIS LIMITED PROCEEDING TO BE TRANSFORMED INTO A RULEMAKING

SWBT desires to resolve any questions under Section 275 that are necessary to have the Plan approved. However, at the same time, the Bureau should not accede to Ameritech's or AICC's attempt to turn this CEI plan approval process into a general rulemaking on Section 275. The Commission may only undertake a rulemaking to implement Section 275(d), and has done so. Both commentors nevertheless suggest various analyses and formulations of Section 275 that would be applied generally to every possible relationship between a BOC and a provider of alarm monitoring service.[23] Notwithstanding AICC's statement that Section 275 means what is says, AICC attempts to re-define the Section 275 prohibition from 'engaging in the "provision of alarm monitoring service"' to "prohibit BOC participation in the alarm monitoring *business*,"[24] and to similarly re-define "alarm monitoring service" so as to "encompass[] the totality of the relationship with the customer."[25] In seeking to so drastically re-write Section 275, AICC is urging several broad pronouncements that would proscribe lawful and consumer-benefitting

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[23] Ameritech, p. 3 (carving the definition of "alarm monitoring service" into three parts, apparently to be applied in the disjunctive); AICC, pp. 7, 8 (a three-part standard, each with multiple subparts used for analysis).

[24] AICC, p. 4 (emphasis in original).

[25] AICC, p.7

relationships between BOCs and providers of alarm monitoring service.

Section 275 was not meant to foreclose any and all BOC involvement in the alarm monitoring industry. Had Congress intended such a result, it could have very easily dictated that result by adopting language that prohibited BOC involvement with any aspect of the alarm business beyond tariffed transmission service. Congress instead only prohibited "alarm monitoring service," which was narrowly defined to proscribe a specific set of activities that, if performed by a BOC, would violate the Section 275 prohibition. Any attempt to expand the definition to encompass other activities or to read Section 275(a)(1) so broadly as to prohibit absolutely any BOC relationship with a provider of alarm monitoring service would not only violate that definition, but would also deny such providers possible efficiencies and consumers the benefits of those efficiencies and increased competition. Section 275 was intended to prohibit BOCs from engaging in the provision of alarm monitoring service, not to protect providers of that service from increased competition from each other through permissible relationships with BOCs, such that the public is denied the benefits of such competition.

The Bureau thus should reject the misplaced invitation to address any Section 275 issue not specifically raised by SWBT's Plan as those matters are not properly before the Bureau and are likely outside of the Bureau's delegated authority to approve CEI plans.

IV. SWBT'S CEI PLAN COMPLIES WITH COMMISSION REQUIREMENTS

AICC's concerns regarding SWBT's potential use of customer proprietary network information ("CPNI") is misplaced, and there is no need for SWBT to amend its CEI Plan in this regard.[26] The purposes for which CPNI may lawfully be used, consistent with the provisions of

[26] AICC, p. 6 n.8.